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Nos. 80-231,
79-1538 and 79-1596

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CECIL D. ANDRUS, SECRETARY
OF THE INTERIOR, *et al.*,
Appellants,

vs.

STATE OF INDIANA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Appellant (No. 79-1538),
Appellee (No. 79-1596),

vs.

VIRGINIA SURFACE MINING AND RECLAMATION
ASSOCIATION, INC., *et al.*,
Appellees (No. 79-1538),
Appellants (No. 79-1596).

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF OF THE STATE OF ILLINOIS AS *AMICUS CURIAE* IN SUPPORT OF INDIANA AND VIRGINIA

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QUESTIONS PRESENTED

Title V of the Surface Mining Control and Reclamation Act of 1977, §§501-29, 30 U.S.C.A. §§1251-79 (Supp. 1980), contains the principal regulatory and enforcement provisions of the statute. These include federally mandated state laws, organizational attributes, processes and rules which states must adopt if they wish to maintain exclusive jurisdiction over the regulation of surface mining and reclamation operations within the state. The statute also contains a variety of demands and limitations affecting the present and future uses of lands utilized for surface mining generally and prime farmlands in particular. In effect, these constitute federally decreed land-use controls and regulations.

The legal issues of particular concern to the *amici* are:

1. Whether the aforementioned provisions in Title V of the Surface Mining Act violate the Tenth Amendment.

2. Whether the same provisions exceed Congress' powers under the Commerce Clause of Article I, Section 8, of the Constitution.

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IN THE

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OCTOBER TERM, 1980

No. 80-231

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.,
Appellants, *

v.

STATE OF INDIANA, ET AL.,
Appellees. **

On Appeal From the United States District Court for the Southern District of Indiana

BRIEF OF THE NATIONAL LEAGUE OF CITIES AND THE STATES OF ARIZONA, KANSAS, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF THE APPELLEES

INTERESTS OF AMICI CURIAE

This *amicus curiae* brief of the National League of Cities and the States of Arizona, Kansas, and Utah as *amici curiae* is submitted with the written consent of all the parties. The letters of consent are on file with the Clerk. Rule 36.1. With respect to the States, consent is not required. Rule 36.4.

* Other defendants below and appellants in this Court are the Director of the Office of Surface Mining Reclamation and Enforcement, the Office of Surface Mining Reclamation and Enforcement, the United States Department of the Interior and the United States of America.

** Other plaintiffs below and appellees here are the Governor of Indiana, the Director of the Indiana Department of Natural Resources, the Indiana Department of Natural Resources, the Indiana Coal Association, Meadowlark Farms, Inc., Amax Coal Company, Peabody Coal Company, and John A. Conlon.

The National League of Cities ("NLC") is an Illinois not-for-profit corporation organized in 1933 to assist municipalities in performing their functions. Its membership includes direct member cities, state municipal leagues and state league member cities. In all almost 15,000 cities and municipalities, both large and small, are members of and participate in the activities of NLC. The functions of NLC as authorized in its Bylaws include "the safeguarding of the interests, rights, and privileges of municipalities." It is in this latter capacity that NLC offers their views in the case at bar.

Joining with NLC on this *amicus curiae* brief are the States of Arizona, Kansas, and Utah. The States, having continually exercised their powers to regulate the use of private nonfederal lands within their borders, have a compelling interest in preserving these integral functions.

In filing this brief in support of the Appellees, the *amici* do not want their action to be misinterpreted. Unequivocally, the *amici* are not opposed to nor do they otherwise resist reasonable and necessary regulation and control in the public interest of surface mining as such. Rather, the *amici* argue that the methodology chosen by Congress and embodied in Title V of the Surface Mining Control and Reclamation Act of 1977 (the "Act") §§501-29, 30 U.S.C.A. §§1251-79 (Supp. 1980), is objectionable both as a legal and as a practical matter as well. Accordingly, the interests of the *amici* in the case at bar stem from their concern for the potentially disruptive consequences to our federal system of governance, and concern for the potentially adverse impact upon the role of state and local governments in that system, should the holdings of the court below be summarily reversed and the methods, rules and postulates embodied in the Act be endorsed as a matter of law by this Court.

At issue in the case at bar are the circumstances, if any, or the extent to which the federal government can mandate and control the organization, procedures and other acts of state governments as governments, and the validity of the federally mandated land-use controls required under the provisions of Title V of the Act.

The relevant sections of the Act deal with surface mining generally and the mining of prime farmlands in particular. These provisions, among other matters, involve the state laws, regulations, organization and procedures which states must adopt and implement if they wish to maintain primary regulatory authority over surface mining and reclamation activities within their borders. The several sections of the statute also establish a variety of requirements for surface mining operations on private lands generally, and particularly lands defined by the federal government as "prime farmlands". These include injunctions against mining of lands located near dwellings, public buildings, parks, schools, churches, etc., and other strictures. Other requirements extend to the post-mining uses of mined lands and include the requirement that mined farmlands be restored to original contour and productivity as farmland.

The court below concluded that various portions of Title V of the Act exceed Congress' powers under the Commerce Clause, impinge upon the sovereign powers of the State of Indiana in violation of the Tenth Amendment, and contravene due process and Taking Clause provisions of the Fifth Amendment and declared these provisions to be invalid. The *amici* urge that these decisions of the court be affirmed.

While the disputes presented in this appeal are raised in the context of federal control of mining, there are underlying controversies which are more far-reaching

than the regulation of surface mining. These issues involve the role of states in the federal system as contemplated and protected by the Constitution, and address the Constitutionally mandated organizing principles which govern or should govern the structure and operation of that federal system in which state and local governments must function and discharge their responsibilities.

Stated in these terms, the fundamental questions suggested by the case before this Court can be described in this fashion:

> First, do the Constitutional precepts of federalism and state sovereignty exemplified by the Tenth Amendment preclude attempts by Congress to displace the established and traditional authority of states to regulate in the public interest the uses of private lands within the borders of the state?
>
> Second, do these same Constitutional precepts of federalism preclude the federal government from attempting to force the states to become unwilling agents of federal laws and enforcement procedures by threats of federal pre-emption of the state's authority to regulate and police the use of private lands within the state?
>
> And finally, does Congress' authority "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;" support federal laws to police the use of private lands within the several states?

In sum, is it Constitutionally appropriate for the federal government to pre-empt responsibility for zoning and land-use planning and controls, and to induce or mandate state legislation, state governmental structures and enforcement procedures to this end, and otherwise to police and regulate all of society in the interests of "protecting" interstate commerce.

The answers to these questions will suggest if the current trend toward the federalization of state and local governments will continue apace, or if under our Constitutional arrangement, the sovereignty, autonomy and separate and independent existence of state and local governments will continue to be a Constitutionally guarded attribute of the federal system of governance.

In part, it was the growing propensity for Congress to enact intrusive legislation together with the consequential obscurement of state versus federal responsibilities and the associated need for more concise and effective concepts of organization and accountability in the federal system which in the 1970's energized NLC, eighteen states and other concerned parties into an active defense of state (and local) government sovereignty against the incursions of the federal government manifested by Congress' efforts to set wage and hour conditions for state and local government employees. In 1976 this Court's ruling in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976) was one of the results of these efforts. In that case, this Court enunciated the outlines of some Constitutionally mandated organizing principles which if followed in the future would do much to foster and to protect the effectiveness of the federal system. But even that ruling continues to be regarded as a judicial aberration and attacked as such by the federal government. *See, e.g.,: Amersbach* v. *Cleveland*, 598 F.2d 1033 (6th Cir. 1979), and *United Transportation Union* v. *Long Island R.R.*, No. 80-7199 (2d Cir. Sept. 15, 1980).

In the 1980's it is increasingly clear that the principles which led this Court to its conclusions in *National League of Cities*, require reiteration and perhaps

clarification as well. In the view of the *amici* the case at bar illustrates the continuing need to declare limits to the powers under the Commerce Clause when the use of such authorities by Congress jeopardizes the sovereignty of states and the ability of state and local governments to function in the federal system as the Constitution contemplates and mandates. At issue is the efficacy of the nation's system of governance — and its political viability as well.

SUMMARY OF ARGUMENT

The requirements of Title V of the Act include the laws, organization, processes and rules which states must adopt to maintain authority over surface mining and reclamation within the state. Title V also sets out a variety of limitations affecting the present and future use of private lands which constitute federally decreed land-use controls and regulations. These requirements exceed Congress' powers under the Constitution in three respects.

First, control and regulation of land use for the benefit of state residents are traditional and basic functions of state and local governments. This activity involves the exercise by states of their authority to enact and administer public laws and thereby to furnish public services to citizens of the state. The ability to discharge these responsibilities constitutes an attribute of state sovereignty which under the precepts of federalism, as exemplified by the Tenth Amendment, may not be impaired by Congress utilizing its authority under the Commerce Clause.

Second, these same precepts of Constitutional federalism protect state governments from the type of

federal coercion and infringement on their sovereignty represented by the provisions of the Act which mandate that states must enact laws and organize and administer specified planning and review procedures if the states are to retain authority to plan for and to control the uses of private lands within their borders.

And finally, the federally decreed land-use requirements and controls incorporated in the Act are characteristic of the powers reserved to the states under the Tenth Amendment and as such are not within the powers delegated to Congress under the Constitution.

For these reasons, the decision of the District Court, which concluded that specified portions of Title V of the Act exceed Congress' powers under the Commerce Clause and impinge upon the sovereign power of the State of Indiana in violation of the Tenth Amendment, should be affirmed.

ARGUMENT

1. Regulation Of The Uses Of Land Is An Integral Function Which Is Essential To The Separate And Independent Existence Of State Governments And Is Beyond The Reach Of Congressional Authority Under The Commerce Clause

The District Court found the challenged provisions of Title V of the Act to be unconstitutional, among other reasons, because they constituted federally imposed land-use plans and regulations which operated to displace state policies and choices on integral governmental operations and as such infringed upon the autonomy and sovereignty of states, a Constitutionally protected attribute.

The *amici* here urge that the exercise by a state government of its so-called police powers to regulate, in the interests of state residents, the uses of private lands within that state is a prototypical function of state and local governments. As such, it is protected by precepts of federalism against Congressional interference. What is involved and threatened is the enactment and administration by state governments of public laws governing the uses of lands within the state, and the provision thereby of basic and traditional state government public services to its citizens. As such, the ability to carry on these essential functions and to make the decisions which these activities entail are attributes of state sovereignty which may not be impaired by Congress under the Commerce Clause authority. At issue is the essence of statehood and states in the federal system.

This Court had occasion to consider "what is the correct idea of a State" in *Texas* v. *White*, 74 U.S. 700 (7 Wall.) (1868). Some of the observations of Chief Justice Chase were alluded to in National League of Cities and are a useful preface to consideration of the issues involving state government in the case before the bar.

> It ["state"] describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes only the country or territorial region, inhabited by such a community; not unfrequently it is applied to the government under which the people live; at other times it represents the combined idea of people, territory, and government.
>
> . . . .
>
> In the Constitution the term state most frequently expresses the combined idea just

> noticed, of people, territory, and government. A state, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. . . .
>
> . . . .
>
> Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or the people. And we have already had occasion to remark at this term, that "the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,". . . . 74 U.S. at 720, 721, 725.

The essence of states and statehood is represented by the politically interdependent and functional combination of people, territory and government alluded to by Chief Justice Chase. The autonomy and sovereignty of a state government lies in its ability to exercise the powers reserved to it as a state and thereby to respond to the desires and needs of its citizens by providing necessary protections and suitable services. The services and protections represented by zoning and land-use controls derived through the exercise of the basic powers reserved to the state are, as the *amici* have suggested, traditional and integral state governmental services.

Chief Justice Marshall remarked on the existence in the states of a panoply of legislative powers available for the protection of their welfare and the promotion of local interests: "They form a portion of that immense mass of legislation, which embraces everything within the

territory of a state, not surrendered to the general government; all which can be most advantageously exercised by the states themselves." *Gibbons* v. *Ogden*, 22 U.S. 1, 203 (9 Wheat.) (1824). And three years later, Justice Marshall distinguished this state legislative authority as the police powers. *Brown* v. *Maryland*, 25 U.S. 419, 444 (12 Wheat.) (1827).

The aims and aspirations of state governments — to which ends the police powers constitute the principal means — have been delineated over the years by our courts. For example, Justice Barbour wrote:

> Let us see what powers are left with the States. The Federalist, in the 45th number, speaking of this subject, says; the powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State.
>
> . . . .
>
> . . . [I]t is not only the right, but the bounden and solemn duty of a State to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified and exclusive. *New York* v. *Miln*, 36 U.S. 102, 133, 139 (11 Pet.) (1837).

While the conclusions of the Court in this case with respect to "intrastate commerce" are no longer authoritative, the language cited above would seem still valid as a description of the critical relationships which still exist today between the police powers and the responsibilities and aspirations of state governments to provide for the welfare of their citizens.

Regulation of land use in the interests of the public welfare has been and remains a primary and traditional means whereby state and local governments, exercising their police powers, seek to protect and improve the circumstances of their residents. The principles embodied in zoning ordinances have been spelled out by this Court:

> The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare.
>
> . . . .
>
> . . . [T]he village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit within the limits of the organic law of its creation and the State and Federal Constitutions. Its governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined, not that industrial development shall cease at its boundaries, but that the course of such development shall proceed within definitely fixed lines. *Village of Euclid* v. *Amber Realty Co.*, 272 U.S. 365, 387, 389 (1926).

The propositions set out in *Euclid* have since been reiterated in many decisions in support of state land-use controls. Planning and zoning as a means of influencing the present and future physical development of a com-

munity in order to promote social and economic well-being have been established as traditional and integral functions of state and local governments. Land-use planning and control through zoning laws and their provisions "are peculiarly within the province of state and local legislative authorities." *Warth* v. *Seldin*, 422 U.S. 490, 508 n. 18 (1975). It is a method whereby state and local governments offer individual citizens a means to express their values through the political system and thereby to decree how their communities should develop and grow.

The *amici* have suggested that the fundamental purpose, indeed the essence of state government, is to advance the safety, happiness, and prosperity of its people and thereby to provide for the general welfare, *Miln*. And further, that zoning, land-use planning and control to achieve these ends are basic and integral functions of state and local governments, *Euclid* and *Seldin*. Indeed, as recognized by this Court in these and other cases, there is a functional relationship between the states' positive responsibility to protect and enhance the well-being of its citizens, their use of the police powers to these ends, and land-use controls as a traditional means to achieve these fundamental aims. *See: Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978); *Agins* v. *Tiburon*, _____ U.S. _____, 100 S. Ct. 2138 (1980); *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915).

Accordingly, as demonstrated above, land-use control and planning have been and are traditional state governmental activities involving essential decisions as to the conduct of integral functions carried on by states in their sovereign capacities. And the controls of these essential state decisions which Congress sought to wield

under Title V of the Act, if permitted, would jeopardize states' ability to function within the federal system as contemplated and protected by the Constitution.

As noted in *National League of Cities*, this Court has "repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." 426 U.S. at 845. The standard, in judging between permissible and impermissible federal regulation is whether there is federal interference with "functions essential to separate and independent existence." 426 U.S. at 845. In the context of the case at bar, state and local decisions with respect to the shape, growth, character, and industrial mix of individual communities within the state involve essential attributes of their "freedom to structure integral operations in areas of traditional governmental functions." 426 U.S. at 852.

In *National League of Cities*, the Court defined traditional functions as "typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." 426 U.S. at 851. Zoning and land-use planning are the basic and essential means available to state and local governments, utilizing their police powers to control and shape the physical and economic development of a given community in order to promote social and economic well-being for its citizens. And in the aggregate, community-oriented land-use controls shape the future of the entire state. This governmental function is, as we have said, the essence of state governance and as such should be held to be beyond the reach of the

Commerce Clause impairment contemplated by the land-use regulations of Title V of the Act. Consequently, the *amici* urge that the decision of the lower court be affirmed.

In this context, and given the fundamental importance to state governments of land-use regulation as a means of protecting its citizens and shaping the states' future, it seems appropriate to note that the lower court found that "surface coal mining operations on prime farmlands, as distinguished *per se* from any other type of land, have an infinitesimal or trivial impact on interstate commerce." *Indiana* v. *Andrus*, No. IP 78-500-C, 10 (S.D. Ind. June 10, 1980). When compared with the extent of impairment of essential state functions which the Act contemplates, in contrast with the traditionally local quality of state and local land-use regulation, and considering the importance of the state functions being undermined, and taking into account the value of keeping land-use decisions as close as possible to the citizens most directly affected, and considering the alternative means which are available to achieve the national aims expressed in and through the prime farmlands provisions of the Act, the *amici* urge this Court that the federal aims expressed in and through these prime farmlands provisions do not justify the kind of interference with state sovereignty which this federal law contemplates.

Accordingly, whether one regards the nature and the extent of the impairment of state sovereignty involved here or one balances the character of the federal and state interests involved, the conclusions of the court below are correct and should be affirmed.

2. Constitutional Precepts Of State Sovereignty Preclude The Federal Government From Mandating That The States Function As Agents Of The Federal Government As Contemplated By Title V Of The Act

The statutory arrangement embodied in Title V of the Act contemplates that a state must either cede to the federal government essentially all state authority over the matters covered by the Act (including control over land use) or, in the alternative, that the state will enact such legislation as may be satisfactory to the federal government and otherwise organize and conduct its surface mining and reclamation affairs as dictated by the federal government. In effect, the law contemplates that a state, if it is to retain traditional jurisdiction over and to participate in these matters, must do so not in its own right and sovereignty, but as an unwilling agent of the federal government. The *amici* urge this Court that such a coercive arrangement is unconstitutional as a violation of the precepts of federalism as exemplified by the Tenth Amendment. The court below has so held.

In its opinion, the court, as evidence of the coercive nature of the federal intervention in state prerogatives, recited the language of the Indiana Act passed to authorize the submission to the federal government of a state program. *Indiana* v. *Andrus*, No. IP 78-500-C at 24. The state legislature in its statute characterized the federal law as an intrusion into state and local government functions and justified its legislative response as an effort "to prevent further federal encroachment upon and regulation and control of the state, its people, and local industry, rather than [consideration of] what is in the best interests of the people of the State of In-

diana. . . ." IND. CODE ANN. §13-4.1-1 *et seq.* (Burns). The lower court also noted the expansionary impact of the federal intervention on the Indiana Department of Natural Resources' budget and staff. It concluded that

> The foregoing provisions [of Title V of the Act] require explicit governmental procedures and structures for land use planning and control, and contain explicit land use judgments which will either be implemented through direct Federal usurpation in a Federal program or mandated upon States to be contained within a State program, and constitute displacement, regulation and altering of the management structure and operation of the traditional area of State sovereignty or integral governmental function of land use planning and control. The foregoing provisions are, therefore, contrary to the Tenth Amendment. *Indiana* v. *Andrus*, No. IP 78-500-C at 30.

The *amici* agree.

In *National League of Cities*, this Court found that the FLSA Amendments constituted an improper infringement on state and local governments because they "displace[d] state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require. The Act, speaking directly to the states *qua* states, requires that they shall pay all but an extremely limited minority of their employees the minimum wage rates currently chosen by Congress." 426 U.S. at 847-48. In the case at bar, the federal "displacement" involves the state legislative processes, the organization and operation of the states' executive departments, state policies and decisions with respect to present and future land uses, and the policies which govern the delivery to its citizens of essential land-

use planning and zoning services which are the essence of state governance. Under the federal Act it is the federal government which proposes to provide these services whether the citizens desire them or not.

These characteristic federal encroachments into state sovereignty, in the view of the *amici*, are symptomatic of a growing threat to and a pervasive hazard for the federal arrangement. If this threat is not adequately confronted by our courts and resolved in accordance with the Constitutional principles which guarantee reasonable autonomy for state governments, the trend will lead to further declines in the efficacy of our federal system. Stated very succinctly, because Congress recognizes that as a practical if not legal matter, the federal government cannot administer out of the Nation's Capitol, a national zoning and land-use control program such as the one contemplated under the Act, the federal government has attempted, from time to time, to devise an alternative governmental arrangement under which states are enticed or coerced into becoming federal agents for the implementation of federal policies.

For example, under the Clean Air Act ("CAA") Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, the Environmental Protection Agency ("EPA"), among other sanctions, claimed power in the event a State failed to comply with the CAA's requirements to promulgate its own plan and compel the unconsenting State to enact, finance, and enforce supporting legislation for the pollution control program. *Brown* v. *EPA*, 521 F.2d 827 (9th Cir. 1975), *vacated as moot*, 431 U.S. 99 (1977).

The Ninth Circuit concluded in *Brown* that if the 1970 CAA Amendments were interpreted to authorize

sanctions against the states for failure to utilize their police and revenue powers to enforce EPA standards against private polluters, they would exceed the broadest permissible reach of cooperative federalism. 521 F.2d at 838-40. Faced with the same issue in *Maryland* v. *EPA*, 530 F.2d 215 (4th Cir. 1975), *vacated as moot*, 431 U.S. 99 (1977), the Fourth Circuit stated: "[I]f there is any attribute of sovereignty left to the States it is the right of their legislatures to pass, or not to pass laws." 530 F.2d at 225. And the District of Columbia Circuit concurred in noting that EPA's claim constituted an "impermissible encroachment on state sovereignty." *District of Columbia* v. *Train*, 521 F.2d 971, 992 (1975), *vacated as moot*, 431 U.S. 99 (1977). The *Train* Court concluded:

> We are aware of no decisions of the Supreme Court which hold that the federal government may validly exercise its commerce power by directing unconsenting states to regulate activities affecting interstate commerce, and we doubt that any exist.
>
> What is really needed to accomplish the federal objective in this situation is state cooperation in the administration of a federal regulatory program, and Congress has available numerous means of obtaining that cooperation. . . . *Id.* at 992-93.

In oral argument before the Supreme Court, after *National League of Cities* was decided, the federal government shifted its position and agreed that the statute could not Constitutionally require the states to utilize their police and revenue powers to enforce EPA standards against private polluters. This would impinge upon their integral state function of determining whether and what laws to enact. In a *per curiam* opinion, the Supreme Court vacated and remanded the cases for consideration of mootness. *EPA* v. *Brown*, 431 U.S. 99 (1977).

The CAA cases and the federal government's revised position in light of *National League of Cities* reinforce the contention of the *amici* that federal enactments imposing affirmative duties on the states to exercise their police or revenue-raising powers in federally prescribed ways — such as the challenged CAA requires — are unconstitutional infringements on state autonomy. This CAA litigation is especially significant because air pollution is concededly a national problem whose solution requires the adherence of all — including state and local governments — to uniform national standards.

If the current condition of our federal system with its manifest confusions of the respective roles and responsibilities of its several levels of government, together with associated dissipation of concepts of accountability tells us anything, it suggests the desirability of a return to a more organized structure for the federal arrangement — assuming that effectiveness, efficiency and political responsibility are desirable attributes of a federal system. Accordingly, in the view of the *amici*, continued federalization of state and local governments is neither a warranted policy nor a direction in which the majority of the citizens wish to proceed.

Under constitutional law, voluntary movement toward federalization by individual states would seem to be a matter of state choice — which is to say an exercise of state sovereignty. But where as in the case at bar, the initiatives for federalization come from the federal level and the states themselves object and resist, then it would appear clear that traditional concepts of state sovereignty as exemplified by the Tenth Amendment should offer the protections necessary to preserve the autonomy of states in the federal system.

Accordingly, the *amici* urge that the decisions of the court below be affirmed and that in so doing this Court clarify and enunciate Constitutionally derived guidelines which will act to constrain federal intrusions into the basic roles and responsibilities of state governments.

3. The Authority To Regulate Interstate Commerce Does Not Support Enactment Of Federal Laws Which Displace State Authority To Police The Use Of Private Lands Within The State

Congress' authority to regulate commerce among the states, the *amici* urge, is something other than the authority to enact federal laws which duplicate and in effect displace the state authority to police the use of private lands located within that state. Accordingly, the land-use controls embodied in Title V of the Act are not within the powers delegated to Congress under the Commerce Clause of Article I, Section 8, of the United States Constitution.

In the view of the *amici*, the requirements of the Act dealing with land control aspects of surface mining on prime farmlands conflict directly with the proposition that land-use laws are one of the authorities reserved to the states and as such are the exclusive prerogatives of state governments and the police powers reserved to them. We understand, of course, that federal powers under the Commerce Clause can coexist with state police powers and that "It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states." *United States* v. *Darby*, 312 U.S. 100, 114 (1941). But the provisions of Title V of the Act under attack here present some distinguishing circumstances. In the first place, they are

not "appropriate and plainly adapted to the permitted end." *Id.* at 214. Second, the "police powers" character of the objectional provisions reflect their substance rather than their incidental characteristics. They are land-use regulations and are not regulations of commerce between the states.

Accordingly, the District Court concluded, with particular reference to the approximate original contour and postmining land-use provisions, that

> "The prime farmland provisions" are directed at facets of surface coal mining which have no substantial and adverse effect on interstate commerce. Similarly, the prime farmland provisions are not related to the removal of air and water pollution and are, therefore, not a means [regulation] reasonably and plainly adapted to the legitimate end of removing any substantial adverse effect on interstate commerce. These sections, to the extent set forth, are not within powers delegated to Congress and are unlawful as being contrary to the Constitution. *Indiana* v. *Andrus*, No. IP 78-500-C at 15.

The *amici* share these conclusions. They have stated at the onset that they do not oppose controls over surface mining. But it is one thing to propose regulation, in the public interest under the Commerce Clause authority, of the commercial aspects of surface mining, and Constitutionally speaking, quite another matter to argue, as do the Appellants, that the Commerce Clause is an appropriate vehicle for federal control of land use generally, or even to regulate postmining land uses. We know of no Commerce Clause rationale, for example, that would support and authorize the federal government to police land uses in the pursuit of federally decreed "environmental values" (the words Senator Byrd used to

describe some purposes of the Act as quoted in the opinion of the court below *Indiana* v. *Andrus*, No. IP 78-500-C at 28) whether these values are expressed by the maintenance of acres of rolling farmlands as farmland over the objections of the land owners, or by maintaining against the owners' desires the traditional contours of those same lands. These matters of "environmental values" are reserved for state legislatures to decree.

The Tenth Amendment provides that the powers not delegated to the United States by the Constitution are reserved to the states. Chief Justice Marshall noted that the legislative powers which belong to the states, and are thereby available for the protection of the welfare and local interests of the state, are those which can be most advantageously exercised by the states themselves. *Gibbons* v. *Ogden*, 22 U.S. at 203. And Justice Barbour in *New York* v. *Miln*, *supra*, observed that the powers reserved to the states extend to those matters which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement and prosperity of the state. Accordingly, the *amici* urge this Court that in accordance with the federal system of government described by Justices Marshall and Barbour, whatever may be the scope of the Commerce Clause authority under our Constitution, it is not so broad and far-reaching as to authorize the federal government to duplicate and apply at the state level, the traditional regulatory activities of state governments and thereby substantially to displace state governments in their fundamental functions involving state controls over the use of private lands within their territories. The federal power to regulate commerce between the states is not the authority to police land use within the state.

The *amici* urge this Court that when Constitutional practice has assigned some defined governmental function to the states (in the case at bar, the authority to control and police the use of lands) and that practice is harmonious with the Constitution's enumerated powers of the central government, then that authority under the Tenth Amendment has been reserved to the states and not to Congress. Land-use regulation is such a function. When Congress unreasonably or uncaringly impedes a state government's ability to carry out such a responsibility, Congress is exercising nondelegated powers and violating the Tenth Amendment principle of reservation to the states. And finally, the *amici* urge, that as in this case, Congress' interference is *prima facie* unreasonable if conditions are such that Congress may not be held accountable to the electorate for the consequences of its acts.

The organizing principles implicit in the federal system and compelled by the Constitution contemplate a separation between and an accountability for the exercise of federal and state powers. Certain powers such as the police powers are reserved to the states and are available to states to be exercised as a service to its citizens and a means to realize conditions of social justice in that state. Congress may not act so as to impair critically the ability of states to utilize such authorities; nor may Congress act to displace the exercise of such powers. The land-use control provisions embodied in the Act violate these principles. They are not within the powers delegated to Congress. For these reasons, the decision of the court below should be affirmed.

CONCLUSION

The immediate aim of this *amicus curiae* brief is, for the reasons alluded to earlier, to urge that the decisions of the District Court be affirmed. But it is also the desire and intent of the *amici* to place this controversy into a larger context and thereby to alert this Court as to its implications for the future effectiveness of state and local governments specifically, and the operation of our federal system as well. In the view of the *amici* the significance of the case at bar lies less in what it portends for federal control of surface mining than its potentials for undermining the efficacy of state governments and our traditional methods of governance.

The features of the statutory arrangement before this Court are by no means unique. They are characteristic of an emerging new federalism in which states are relegated to the role of creatures of the national government. By means of this Act and other statutes with similar attributes, Congress apparently seeks to pre-empt and utilize the structures and authorities of state governments and thereby to convert heretofore sovereign entities to the status of instruments (albeit unwilling agents as the Indiana legislature declared) of the federal government. All this is done in the interests of Congressionally mandated federal policies, federal standards and federal choices and aims. In so doing, Congress appears heedless of the legal constraints represented by Constitutionally mandated concepts of federalism and of state autonomy and sovereignty. It also seems careless of the advantages of the type of decentralized government that the Constitution contemplates, which benefits include enhanced opportunities for citizens to make individual choices and to participate as citizens in the responsive and accountable political processes which state and local governments represent. The United States is too big for a centralized

land-use planning and zoning program operated by the federal government out of Washington, D. C. This fact was recognized, of course, by the Founders when they established the form of decentralized government sanctioned by the Constitution.

The *amici* urge this Court that to permit the federal incursions into traditional state functions exemplified by Title V of the Act would be bad Constitutional law. But beyond the constraints of law, such federal raids on the responsibilities and functions of state and local governments produce a kind of ineffectual and unaccountable method of governance which portends serious functional and political difficulties for the federal system at large.

Stated very succinctly, it is the perception of the *amici* that the cumulative changes in our federal system over the past several decades have not adequately been guided or constrained by any ascertainable organizing principles whatsoever — Constitutional or otherwise. Consequently, in the view of the *amici*, the performance of our federal governmental system has suffered. It has become an increasingly dysfunctioned form of federalism. Among other obvious deficiencies, contemporary intergovernmental relations have become more pervasive, more intrusive, more unmanageable, more ineffective, more costly, and above all, more unaccountable.[1] In today's federal system, for inquiring citizens,

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[1] These conclusions are shared, among others, by the Advisory Commission on Intergovernmental Relations which is concluding a study in depth of the federal role in the federal system. For example:

> Over the past twenty years the federal role has become *bigger*, *broader*, and *deeper* — bigger within the federal system, in the size of its intergovernmental outlays, and in the number of grant programs; broader in its program and policy concerns; and deeper in its regulatory thrusts, preemption proclivities, and the wide range of subnational governments interacting directly with Washington. This is the broad summary

the answer grows more vague as to which level of government is responsible for what governmental activity or result.

It is not the aim of the *amici* to turn back the clock, to return to the precepts of *Hammer* v. *Dagenhart*, 247 U.S. 251 (1918) in lieu of the scope of *United States* v. *Darby*, *supra*. But this brief should be construed at least in part, as an attack on the legislative mode embodied in Title V of the Act. It is typically intrusive and coercive. It has been enacted, it seems, without a manifest concern for preserving the fundamental attributes of state sovereignty. It seeks without reservation to impose on the states the federal will and the federal standards without regard to costs or consequences to the states and the citizens of those states. The methods which Congress has chosen to pursue its federal interests is a bad method because, among other reasons, it displays a lack of appreciation for the need to protect and foster a federal system in which state governments retain their sovereign-

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conclusion that emerges from this ten volume study and it points to a growing centralization of policymaking. Yet, perhaps surprisingly, this conclusion does *not* produce a companion generalization that the system's *delivery of services* is infinitely more centralized than its predecessor of a generation ago. What *is* certain is that the current labyrinth of countless intergovernmental relationships — with their multiple vertical, diagonal, curving, and haphazardly horizontal connections — is far more dysfunctional than that of 1960.

The contrasts, then, between the "systems" of 1960 and 1980 are stark, but the continuities between them, along with perplexing paradoxes in both, leave us with an open debate over whether we still have a noncentralized system but with a general consensus that it does not function well. X ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *The Federal Role in the Federal System: The Dynamics of Growth*, in AMERICAN FEDERALISM 1960-1980: CONTRASTS AND CONTINUITIES (A-86) (publication forthcoming U.S. Government Printing Office)

ty and thereby their ability to discharge their Constitutional responsibilities to their citizens within that system as originally contemplated by the Founders.

It is for these reasons that the *amici* suggest that the effectiveness of Congress, and the federal Executive Branch as well, would benefit if this Court were to elucidate in the context of the statutory method here under consideration, the limits of the Commerce Clause and the Constitutional constraints upon Congressional powers which in the past have decreed and protected the organizational attributes of the federal system. In the view of the *amici*, adherence to these principles is necessary if the federal system is to continue to work effectively in the interests of all the people. The workability of the federal system is the ultimate issue before this Court. The *amici* urge that the decisions of the court below be affirmed.

Respectfully submitted,

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